

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RAUL F. PEREZ,

Petitioner,

vs.

M. BITER, Warden,

Respondent.

No. C 11-3352 JSW (PR)

**ORDER OF DISMISSAL; GRANTING
LEAVE TO PROCEED IN FORMA
PAUPERIS**

(Docket No. 2)

Petitioner, a prisoner of the State of California proceeding pro se, has filed a habeas corpus petition pursuant to 28 U.S.C. § 2254. Petitioner concedes that he presently has a petition for a writ of habeas corpus pending in the Monterey County Superior Court. (Pet. at 4-5.) The Ninth Circuit has held that the habeas exhaustion requirement is not satisfied if there is a pending proceeding in state court, even if the issue the petitioner seeks to raise in federal court has been finally determined by the highest available state court. *Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983). This is because the pending state action might result in reversal of the conviction on some other ground, mooted the federal case. *Id.*

The petition is DISMISSED without prejudice to refile it when no further proceedings are pending in the California state courts. *See id.* (if state court action is

1 pending, claims are not exhausted). Petitioner's motion for leave to proceed in forma
2 pauperis is GRANTED.

3 Rule 11(a) of the Rules Governing Section 2254 Cases now requires a district
4 court to rule on whether a Petitioner is entitled to a certificate of appealability in the same
5 order in which the petition is decided. Petitioner has failed to make a substantial showing
6 that a reasonable jurist would find this Court's denial of his claim on procedural grounds
7 debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Consequently, no
8 certificate of appealability is warranted in this case.

9 The Clerk shall enter judgment and close the file.

10 IT IS SO ORDERED.

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12 DATED: August 24, 2011

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15 JEFFREY S. WHITE
16 United States District Judge
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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

RAUL PEREZ,

Plaintiff,

v.

BITER M, WARDEN et al,

Defendant.

Case Number: CV11-03352 JSW

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on August 24, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Raul Frank Perez G-53624
Kern Valley State Prison
D-1/208
P.O. Box 5104
Delano, CA 93216

Dated: August 24, 2011



Richard W. Wieking, Clerk
By: Jennifer Ottolini, Deputy Clerk